

**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, D.C. 20554**

March 11, 2003

**In Reply Refer To:**  
1800B3-IB

Paul H. Brown, Esq.  
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1827 Jefferson Place, N.W.  
Washington, D.C. 20036

In re: DKTMN(FM) Cloudcroft, NM  
File No. BLH-20010924AAM  
Silent Since: 11/7/2001  
Facility No. 89049

Dear Counsel:

This letter concerns: (1) the staff's January 3, 2003, notification that the referenced license had automatically forfeited pursuant to the silent station provisions of Section 312(g) of the Communications Act ("the Act"), 47 U.S.C. § 312(g),<sup>1</sup> and (2) the timely petition, filed February 3, 2003, on behalf of A-O Broadcasting Corporation ("A-O"), for reconsideration of this notification. For the reasons detailed below, A-O's petition will be denied.

Background. KTMN(FM) suspended operations on November 7, 2001, due to a computer failure. KTMN(FM) thereafter lost its transmitter site. The staff granted the station authority to remain silent for twelve months, until November 7, 2002. On September 30, 2002, the staff granted A-O's application to relocate KTMN(FM)'s facilities to a new tower at the Wofford Peak Electronics Site. At issue is whether KTMN(FM) resumed its authorized transmission of broadcast signals by November 7, 2002, to prevent automatic forfeiture of its license at 12:01 a.m. on November 8, 2003, pursuant to Section 312(g) of the Act.

On November 21, 2002, A-O informed the staff that KTMN(FM) conducted signal tests at the Wofford Peak site beginning on November 7, 2002, the date of

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<sup>1</sup>Section 312(g) of the Act states that a broadcast license for any station failing to transmit broadcast signals for any consecutive twelve-month period expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary. *See also* 47 C.F.R. § 73.1740(c).

expiration, and continuing intermittently on dates thereafter. The staff ruled on January 3, 2003, that these test transmissions did not constitute “broadcast signals” and thus did not prevent automatic forfeiture of the license.<sup>2</sup>

A-O’s petition for reconsideration is based on a new declaration concerning earlier events. Mark Swalley, a station employee, swears under penalty of perjury that he assisted A-O’s President in efforts to activate KTMN(FM) two days prior to expiration. According to Mr. Swalley, KTMN(FM) briefly resumed broadcast operations at the Wofford Peak site on November 5, 2002, playing six or seven songs and two pre-recorded station IDs before the power system failed.<sup>3</sup>

Discussion. Our consideration of new facts on reconsideration is appropriate only if the facts occurred after the petitioner’s last opportunity to present such matters, the petitioner could not have known of the additional facts through ordinary diligence, or consideration of the new facts is required in the public interest.<sup>4</sup> Given that the alleged November 5, 2002, activation of KTMN(FM) occurred prior to events previously reported and involved the direct participation of A-O’s president, A-O does not contend that any new event or unknown fact is involved. Instead, A-O alleges that reconsideration is warranted in the public interest. A-O argues that KTMN(FM) is one of only two FM stations allotted to Cloudcroft, and that the Commission previously found that a new FM allotment in Cloudcroft would serve the public interest.<sup>5</sup> Those arguments provide no public interest basis for considering the new facts. Public interest findings made in allotting KTMN(FM)’s channel to Cloudcroft are immaterial because the channel will remain allotted to Cloudcroft regardless of whether we grant reconsideration. The only case that A-O cites in support of our considering new information involved public safety, a matter not at issue here.<sup>6</sup>

Finally, even if the staff considered A-O’s new evidence, the permittee’s November 5, 2002, operations were not authorized broadcasts, and thus, do not represent

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<sup>2</sup> *Letter to Paul Brown, Esq.*, 18 FCC Rcd 35 (Aud. Ser. Div., 2003).

<sup>3</sup> *Declaration of Mark Swalley*, attached to Petition for Reconsideration.

<sup>4</sup> See 47 C.F.R. § 1.106(c). This rule is fundamental to the Commission’s processes, encouraging applicants and others to provide complete information at an early stage, thereby minimizing the need for reconsideration proceedings and enabling the Commission’s processes to operate efficiently because facts are not presented in a piecemeal fashion.

<sup>5</sup> The second station is KNMB(FM), Cloudcroft, New Mexico, which has been licensed since October 28, 2002.

<sup>6</sup> See *Southwest Central Dispatch*, 17 FCC Rcd 15633, 15636 (Wireless Telecom. Bur., 2002) (new information related to license for emergency fire communications accepted on reconsideration because of direct relationship to public safety).

a “break” in the station’s silence.<sup>7</sup> A-O’s permit (BPH-20020822AAC, granted September 30, 2002) for the Wofford Peak site clearly states that the automatic program test provisions of 47 C.F.R. § 73.1620 do not apply, and requires A-O to file a formal request for program test authority at least ten days *prior* to the date on which program tests are to commence. We have no record of receiving such a request by October 25, 2002, the last date the station could have requested November 5, 2002, program test authority. Further, A-O itself conceded two weeks *after* the permit’s forfeiture that it made no such request and, in fact, A-O has never sought program test authority.<sup>8</sup> Moreover, A-O did not request special temporary authority to return to the air with parameters other than those authorized in its license.

Accordingly, the petition for reconsideration filed on behalf of A-O Broadcasting Corporation IS DENIED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>7</sup>See *Idaho Broadcasting Consortium*, 16 FCC Rcd 1721, 1723 (M. Med. Bur., 2001) (a licensee cannot avoid the statutory deadline imposed in 47 C.F.R. § 312(g) by operating at variance from its permit without staff approval).

<sup>8</sup> *Letter to Marlene H. Dorch, Secretary, FCC from Paul H. Brown, Esq.*, (dated November 21, 2002) (“KTMN will be requesting program test authority shortly”).